Supreme Court of the United States

OCTOBER TERM, 1941

No. 48

LOUIS H. PINK, Superintendent of Insurance of the State of New York,
Petitioner,

v.

A. A. A. HIGHWAY EXPRESS, INC., ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

CONCLUDING ARGUMENT OF COUNSEL FOR PETITIONER, FILED IN WRITING BY SPECIAL PERMISSION OF THE COURT

ELLIOTT GOLDSTEIN,
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I.

THE LIQUIDATION PROCEEDING IN NEW YORK IS THE STATUTORY SUBSTITUTE FOR A CREDITOR'S BILL FOR THE DISSOLUTION OF A CORPORATION, ITS LIQUIDATION AND THE DETERMINATION OF THE RIGHTS OF ALL CREDITORS

In New York, Chapter 28 of the Consolidated Laws (R. 26) completely covers the subject of insurance.

In re *National Surety Company*,
27 N. E. (2) 505, (Our reply brief, p. 20).

In open court, Mr. Hooper, Counsel for the respondents, admitted that they had received notice of the liquidation proceedings and had elected not to show cause.

Exhibit "E" to the second report of the Liquidator, which was the basis of the judgments fixing the assessments (R. 36), is incorporated (as far as Georgia residents are concerned) in the original petition (R. 8, paragraph 7; R. 10, paragraph 14). Paragraph 7 is amplified (R. 21, paragraph 6, et seq.), and the policy now in controversy is identified in the record and was before the court when it considered the assessment against persons named in Exhibit "E" (R. 47).

Mr. Justice Douglas, during the argument, raised a question regarding the second defense outlined by the Georgia Supreme Court (R. 88) "that some of the defendants were not policyholders of the *** Company at the time of its dissolution." This issue was foreclosed by an amendment (R. 21, paragraph 9), and as this is admitted by demurrer, that issue is eliminated.

II.

ALL RELIEF WAS DENIED TO PETITIONER, INCLUDING HIS COMMON LAW RIGHT TO RECOVER PREMIUMS (Our Reply Brief, p. 13)

This was a denial of the title of the Superintendent and the case must be reversed on the authority of *Clark v. Williard,* 292 U. S. 112.

What Georgia will rule after a proper understanding of the Superintendent's title, is a matter first for con-

sideration by the State courts. Respondents do not seriously justify this denial of relief.

III.

RESPONDENTS HAVE POLICIES WHICH ARE ASSESSABLE OR THEY HAVE NO POLICIES AT ALL

The suggestion in the argument that policyholders were misled by the fact that notice was on the back of the policy arose only in the argument of Counsel. There is no such defense in the record and the Suprem eCourt of Georgia did not base its opinion on that ground.

In the courts below respondents contended and the Supreme Court agreed with them that a mutual insurance company may issue policies on a cash premium and to policyholders who do not become members (R. 95). It is now conceded that a New York mutual insurance company cannot issue such policies. It must, therefore, follow that those who take these policies are members, or they are not insured at all. But none of the respondents have offered to rescind their policies. If legal grounds exist for such rescission, that is a matter for the State courts when the case has been returned with proper direction. However, we call attention to the fact that as against the rights of the public these policyholders cannot rescind. *Bolta Rubber Company v. Lowell Trucking Corp.*, 23 N. E. (2) 873 (improperly cited in our original brief as 25 N. E. (2) 973). And the further fact asserted in our briefs (original brief, p. 52, brief accompanying petitio nfor certiorari, p. 28, reply brief, p. 2 (1)) that these policyholders have filed large claims in the liquidation proceedings in New York.

These claims were filed long after the rights of assessment had been asserted, and by intervening in the New York proceedings the policyholders became bound by the report of Referee Frankenthaler, or to say the least, they became estopped to contend that their policies are not subject to New York laws.

IV.

BY-LAWS ARE PART OF A MUTUAL POLICY WITHOUT INTERNAL REFERENCE THERETO

Inquiry was made from the Bench by Mr. Justice Black regarding the presence of a reference to the by-laws in all of the fraternal insurance cases decided by this Court. We do not find such clear reference in the reported cases, however all the text books hold that the policyholders become bound although such constitution and by-laws may not be referred to in the certificates of membership. This subject is fully discussed in the recent decision of the Supreme Court of Maine on the identical assessment. *Pink, Supt. v. Town Taxi Co., Inc.*, 21 Atl. (2) 656, (Our brief, p. 10, 18, 22).

That the Georgia courts could not justify this denial of relief, based upon their own public policy or decisions, appears from *Barbot v. Mutual Reserve Fund Life Association*, 100 Ga. 681 at 694, a case not heretofore cited, holding:

> "This being a mutual association, controlled by its members, and each bearing his share of the burdents for the benefit of the whole membership, the contract of a member is different from an ordinary life insurance policy. The latter is held to the con-

tract which determins the rights of the company and the insured, and to be the whole of the contract; but inasmuch as both the benefits and the burdens in a mutual society are to be equal and beaing on all its members alike, it is well settled that the certificate of membership is only a part of the written evidence of the contract, and that in such a socity the charter, or constitution and by-laws in force at the time of the admission of a member, are terms of an executory contract, and that by entering the society the member assents to all of such terms; and that they each become a part of the contract of insurance, *whether they are incorporated in or referred to by the certificate of membership or not.*"

V.

THE CONTRACT WHICH THE COMPANY ACTUALLY MADE CONSISTS OF THE ENTIRE POLICY, INCLUDING THE NOTICE OF CONTINGENT LIABILITY

Reference was made in the argument to the legend on the folded back "National Standard Automobile Policy". The word "standard" has a definite meaning regarding coverage. The back of the folded policy also contains the contingent liability notice and informs the insured that the home office of the Company is in New York.

Aside from the contingent liability feature, one paying a cash premium to a mutual association is a member and bound by its by-laws. *Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 661 (R. 100).

One enjoying the privilege of a stockholder is bound though he never received his stock certificate. *DeLoach v. Bennett,* 156 Ga. 633 (R. 103).

VI.

THE LIABILITY TO ASSESSMENT CANNOT BE MEASURED BY RESPONDENT'S PRESENT ATTITUDE

It is asserted that the penalty of assessment was neither contemplated nor accepted. "The law does not permit the rights of creditors to be subjected to such a test", (Our brief, p. 21, citing *Sanger v. Upton,* 91 U. S. 563.

In all of the stockholder cases before the Court, such as *Converse v. Hamilton* and *Hancock National Bank v. Farnum,* the certificates contained no warning of the peculiar statutory provisions of those states, and certainly no person in a distant state, receiving these certificates, had any actual warning of the liability. An excellent discussion of this subject appears in *Hancock National Bank v. Ellis,* (Mass.), 42 L. R. A. 396 at 402, where the court said:

> "Persons becoming stockholders in foreign corporations can ascertain the nature and extent of the liability of the stockholders in such corporations according to the laws of the state or country under which the corporations are organized, and they cannot complain if this liability is enforced against them."

VII.

THIS CONTRACT IS COVERED BY THE LAWS OF NEW YORK

The amount of the premiums discloses that the policies cover fleets of trucks or busses. It is a matter of pub-

lic notice that carriers of this type shop around for the cheapest insurance. They chose a small mutual company for reasons satisfactory to themselves. The premiums and terms of these policies are arranged in the home office. A mutual company has no agents, the person countersigning is an employee.

See *Hartford Steam Boiler Co. v. Harrison*, 183 Ga. 1, 187 S. E. 648, 301 U. S. 459.

Though the insurance was intended to cover vehicles which had their resting place in Georgia, the contract as a whole, including the dividends and assessments, was to be performed in New York and any claims against these policies were payable there.

In the absence of clear proof that this is a Georgia contract, and aided by the presumption that the rights of membership are governed by the laws of the state of incorporation (Bolin case, our reply brief, p. 3), this case falls squarely under the principles announced in *Coghlan v. South Carolina Railroad Co.*, 142 U. S. 101 at 109.

And it must be presumed that the parties intended to make a valid contract. If the assessment provision was not enforceable in Georgia, it must be presumed that the parties intended the contract to be made in a state where it was enforceable (*Pritchard v. Norton*, 106 U. S. 124, at 132, 133), otherwise, the policyholders would be defrauding the public service commissions with whom they qualified on the strength of these policies. (Petition for certiorari, p. 15).

CONCLUSION

The Georgia Supreme Court applied its view of the general law when it said, (R. 95) "there are numerous

cases holding that a mutual insurance company may issue policies on a cash premium and to policyholders who do not become members." But it did not and could not say that this was the law of New York. For this vital error the case should be reversed.

Pink v. Georgia Stages, Inc., 35 Fed. Supp. 437, fell into the same error. (Our reply brief, p. 23).

Respectfully submitted,

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